

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

WHIDBEY ENVIRONMENTAL ACTION
NETWORK (WEAN),

Petitioners,

v.

ISLAND COUNTY,

Respondent.

Case No. 98-2-0023c

ORDER FINDING COMPLIANCE

THIS matter came before the Board for a compliance hearing following Island County's submittal of a compliance report.¹ The hearing was held on December 16, 2015. Board members Raymond Paoella, Nina Carter, and William Roehl took part in the telephonic hearing with Mr. Roehl presiding. Island County (County) was represented by Daniel B. Mitchell. Petitioner Whidbey Environmental Action Network (WEAN) was represented by David A. Bricklin. Steve Erickson, a member of WEAN, also participated.

I. BURDEN OF PROOF

After the Board has entered a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.² After the period for compliance has expired, the Board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.³ For purposes of Board review of the comprehensive plans and development regulations adopted by local governments in response to a noncompliance finding, the presumption of validity applies and the burden is on the

¹ Island County's Compliance Report-Statement of Actions Taken, filed November 2, 2015. WEAN did not file a response to the County's Compliance Report.

² RCW 36.70A.300(3)(b).

³ RCW 36.70A.330(1) and (2).

1 challenger to establish that the new adoption is clearly erroneous in view of the entire record
2 before the board and in light of the goals and requirements of the GMA.⁴

3 In order to find the County's action clearly erroneous, the Board must be "left with the
4 firm and definite conviction that a mistake has been made."⁵

5 Within the framework of state goals and requirements, the Board must grant
6 deference to local governments in how they plan for growth:
7

8 In recognition of the broad range of discretion that may be exercised by
9 counties and cities in how they plan for growth, consistent with the
10 requirements and goals of this chapter, the legislature intends for the boards
11 to grant deference to the counties and cities in how they plan for growth,
12 consistent with the requirements and goals of this chapter. Local
13 comprehensive plans and development regulations require counties and cities
14 to balance priorities and options for action in full consideration of local
15 circumstances. The legislature finds that while this chapter requires local
16 planning to take place within a framework of state goals and requirements, the
17 ultimate burden and responsibility for planning, harmonizing the planning
18 goals of this chapter, and implementing a county's or city's future rests with
19 that community. RCW 36.70A.3201 (in part).

20 In sum, during compliance proceedings the burden remains on WEAN to overcome
21 the presumption of validity and demonstrate that any action taken by the County is clearly
22 erroneous in light of the goals and requirements of chapter 36.70A RCW (the Growth
23 Management Act).⁶ Where not clearly erroneous and thus within the framework of state
24 goals and requirements, Island County's planning choices must be granted deference.

25 II. PROCEDURAL HISTORY, DISCUSSION AND ANALYSIS

26 As framed by the Thurston County Superior Court in 2013 when it remanded this
27 matter to the Board, the "... remaining issue raised in this proceeding is the County's
28 regulation of existing and on-going agricultural activities within rural lands". That court found
29
30
31

32 ⁴ RCW 36.70A.320(1), (2), and (3).

⁵ *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d. 646 (1993).

⁶ RCW 36.70A.320(2).

1 the County's prior exemptions were "clearly erroneous in view of the entire record before the
2 board and in light of the goals and requirements" of the GMA.⁷

3 The Board's April 6, 2015, compliance hearing considered the application of a critical
4 areas regulation exemption for rural zoned lands: one for "[e]xisting and on-going
5 agricultural activities when undertaken pursuant to best management practices to minimize
6 impacts to critical areas".⁸

7
8 The compliance action taken by the County prior to the April 2015 hearing was
9 adoption of an interim ordinance limiting the scope of the critical area regulation's exemption
10 to land zoned Commercial Agriculture and Rural, lands participating in the chapter 84.34
11 RCW agricultural property tax program, and lands encumbered in perpetuity by a recorded
12 easement for the purpose of preservation of agricultural practices.

13 While WEAN did not object to the substance of the County's action, it took exception
14 to the fact that the compliance action was an interim ordinance.⁹ The Board agreed with
15 WEAN, finding it was unable to address compliance until adoption of a permanent
16 ordinance.¹⁰

17
18 The County has now enacted Ordinance No. C-106-15, permanently adopting the
19 interim regulations.¹¹ The referenced exemption is limited to:

- 20 1. Land zoned Commercial Agriculture and Rural Agriculture;
21 2. Lands participating in the agricultural tax program pursuant to chapter 84.34
22 RCW; or,
23 3. Lands that are encumbered in perpetuity by a recorded easement created for the
24 purpose of preservation of agricultural purposes.

25 WEAN concurs that the County has achieved compliance.¹²

26
27 ⁷ Letter Opinion of the Honorable Chris Wickham, April 2, 2013, p. 3. Thurston County Superior Court Cause
28 No. 06-2-02026-7.

29 ⁸ An extensive history of this case was included in the Board's May 1, 2015, Order Finding Continuing Non-
30 Compliance.

31 ⁹ "The County's interim action is to limit the exemption so that it applies only to lands with some sort of formal
32 dedication to agriculture. [If the County had adopted the action in the form of a permanent ordinance, we
would have no issue.] But the County's corrective action is merely interim in nature." WEAN's Response to
County Notice of Action Taken, filed March 17, 2015. p. 1.

¹⁰ Order Finding Continuing Non-Compliance, May 1, 2015, p. 4.

¹¹ Adopted October 20, 2015,

¹² Statement of David A. Bricklin during Compliance Hearing of December 16, 2015.

1 The compliance action taken by the County, adoption of Ordinance No. C-106-15,
2 addresses the bases for the Thurston County Superior Court's decision finding GMA non-
3 compliance. The exemption has also been tailored to address the concerns raised in
4 *WEAN v. Island County*, 122 Wn. App. 156, 183 (In short, the record does not support the
5 County's contention that such a broad exemption, which includes all R lands, is necessary .
6 . . .) and *Clallam County v. W WGMHB*, 130 W. App. 127, (We conclude that the County
7 may balance the preservation of nondesignated agriculture against preservation of the
8 environment under critical areas regulation. Accordingly, the County may frame its critical
9 areas exemption more broadly than to include just designated farm land.)
10

11 III. ORDER

12
13 The Board finds Island County has achieved compliance in regards to its application
14 of an agricultural exemption from the critical areas ordinance to all rural lands and this case
15 is CLOSED. Entry of this order should not be interpreted to limit WEAN from asserting any
16 critical area habitat issues that could properly be raised on compliance in Case No. 14-2-
17 0009.
18

19 Dated this 23rd day of December, 2015.
20

21
22 _____
William Roehl, Board Member

23
24 _____
Nina Carter, Board Member

25
26 _____
Raymond L. Paolella, Board Member
27
28
29
30
31
32